

REFERENCE TITLE: **contractor retention**

State of Arizona
House of Representatives
Forty-eighth Legislature
Second Regular Session
2008

HB 2273

Introduced by
Representatives Reagan, Crandall, Schapira

AN ACT

**AMENDING SECTIONS 32-1129.01 AND 32-1129.02, ARIZONA REVISED STATUTES;
RELATING TO CONTRACTORS.**

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 32-1129.01, Arizona Revised Statutes, is amended to
3 read:

4 32-1129.01. Final payments; security for performance; progress
5 payments by owner; conditions; interest;
6 definition

7 A. EXCEPT AS PROVIDED IN SUBSECTION I, AN OWNER UNDER A CONSTRUCTION
8 CONTRACT SHALL MAKE FINAL PAYMENT TO THE CONTRACTOR NOT LATER THAN THIRTY
9 DAYS AFTER THE CONTRACTOR HAS FULLY PERFORMED ITS OBLIGATIONS UNDER THE
10 CONSTRUCTION CONTRACT AND HAS PROVIDED THE OWNER A BILLING OR INVOICE FOR THE
11 FINAL PAYMENT IN ACCORDANCE WITH THE PROVISIONS OF THE CONSTRUCTION CONTRACT.
12 THIS SECTION DOES NOT PROHIBIT THE OWNER FROM WITHHOLDING FROM THE FINAL
13 PAYMENT AN AMOUNT NECESSARY TO DO ANY OF THE FOLLOWING:

14 1. CORRECT DEFECTIVE CONSTRUCTION WORK OR MATERIALS NOT REMEDIED.
15 2. COMPENSATE THE OWNER FOR THE CONTRACTOR'S FAILURE TO COMPLY WITH
16 OTHER PROVISIONS OF THE CONSTRUCTION CONTRACT OR ANOTHER CONSTRUCTION
17 CONTRACT BETWEEN THE PARTIES.

18 3. PROTECT THE OWNER FROM THIRD-PARTY CLAIMS THAT HAVE BEEN FILED OR
19 THAT THE OWNER REASONABLY ANTICIPATES WILL BE FILED.

20 4. PAY THIRD PARTIES WHO PROVIDED LABOR, EQUIPMENT OR MATERIALS TO THE
21 CONSTRUCTION PROJECT AND WHOM THE CONTRACTOR FAILED OR REFUSED TO PAY IN
22 ACCORDANCE WITH THE TERMS OF THE THIRD PARTY'S CONTRACT WITH THE CONTRACTOR.

23 5. PAY OTHER DAMAGES TO THE OWNER.

24 B. SUBSECTION A DOES NOT PRECLUDE AN OWNER FROM WITHHOLDING FROM FINAL
25 PAYMENT A DECLINED BILLING OR ESTIMATE FOR APPROVAL AND CERTIFICATION AS
26 DESCRIBED IN SUBSECTION F.

27 C. AN OWNER MAY ACCEPT, BUT IS NOT LIMITED TO, ANY OF THE FOLLOWING AS
28 SECURITY FOR PERFORMANCE IN A CONSTRUCTION CONTRACT:

29 1. RETENTION.

30 2. AN ASSIGNMENT OF TIME CERTIFICATES OF DEPOSIT OF BANKS LICENSED BY
31 THIS STATE, SECURITIES OF OR GUARANTEED BY THE UNITED STATES OR SECURITIES OF
32 THIS STATE IN AN AMOUNT EQUAL TO WHAT THE OWNER DEEMS APPROPRIATE IF THE
33 CONSTRUCTION CONTRACT ALLOWS FOR RETENTION.

34 3. A PERFORMANCE BOND.

35 4. A PAYMENT BOND.

36 5. AN INVESTMENT CERTIFICATE OR SHARE ACCOUNT THAT IS ASSIGNED TO BOTH
37 PARTIES AND THAT IS ISSUED BY A FEDERALLY INSURED FINANCIAL INSTITUTION.

38 6. A LETTER OF CREDIT.

39 7. ANY OTHER FORM OF SECURITY AGREEABLE TO THE PARTIES.

40 ~~A.~~ D. By mutual agreement with a contractor, an owner may make
41 progress payments on construction contracts of less than sixty days. An
42 owner shall make progress payments to a contractor on all other construction
43 contracts. Progress payments shall be made on the basis of a duly certified
44 and approved billing or estimate of the work performed and the materials
45 supplied during the preceding thirty day billing cycle, or such other billing

cycle as stated in the construction contract. If billings or estimates are to be submitted in other than thirty day billing cycles, the construction contract and each page of the plans, including bid plans and construction plans, shall specifically identify such other billing cycle in a clear and conspicuous manner as prescribed in subsection ~~B~~ E. Except as provided in subsection ~~C~~ F, the owner shall make progress payments to the contractor within seven days after the date the billing or estimate is certified and approved pursuant to subsection ~~D~~ G.

~~B~~ E. A construction contract may provide for a billing cycle other than a thirty day billing cycle if the construction contract specifically sets forth such other billing cycle and either of the following applies:

1. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Alternate Billing Cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. Billings or estimates for this contract shall be submitted as follows:

2. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Alternate Billing Cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. A written description of such other billing cycle applicable to the project is available from the owner or the owner's designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description on request.

~~C~~ F. An owner may make progress payments later than seven days after the date the billing or estimate is certified and approved if both:

1. The construction contract in a clear and conspicuous manner specifically provides for a later payment defined by a specified number of days after certification and approval.

2. The following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Extended Payment Provision

This contract allows the owner to make payment within ____ days after certification and approval of billings and estimates.

1 ~~D.~~ G. A billing or estimate shall be deemed approved and certified
 2 fourteen days after the owner receives the billing or estimate, unless before
 3 that time the owner or the owner's agent prepares and issues a written
 4 statement detailing those items in the billing or estimate that are not
 5 approved and certified. An owner may decline to approve and certify a
 6 billing or estimate or portion of a billing or estimate for unsatisfactory
 7 job progress, defective construction work or materials not remedied, disputed
 8 work or materials, failure to comply with other material provisions of the
 9 construction contract, third party claims filed or reasonable evidence that a
 10 claim will be filed, failure of the contractor or a subcontractor to make
 11 timely payments for labor, equipment and materials, damage to the owner, ~~OR~~
 12 reasonable evidence that the construction contract cannot be completed for
 13 the unpaid balance of the construction contract sum or a reasonable amount
 14 for retention. The owner is deemed to have received the billing or estimate
 15 when the billing or estimate is submitted to any person designated by the
 16 owner for the receipt of these submissions or for review or approval of the
 17 billing or estimate.

18 ~~E.~~ H. An owner may withhold from a progress payment only an amount
 19 that is sufficient to pay the direct expenses the owner reasonably expects to
 20 incur to correct any items set forth in writing pursuant to subsection ~~D.~~ G.

21 ~~F.~~ I. An owner may extend the period within which the billing or
 22 estimate is certified and approved if both:

23 1. The construction contract in a clear and conspicuous manner
 24 specifically provides for an extended time period within which a billing or
 25 estimate shall be certified and approved defined by a specified number of
 26 days after the owner has received the billing or estimate.

27 2. The following legend or substantially similar language, setting
 28 forth the specified number of days, appears in clear and conspicuous type on
 29 each page of the plans, including bid plans and construction plans:

30 Notice of Extended Certification and
 31 Approval Period Provision

32 This contract allows the owner to certify and approve
 33 billings and estimates within ____ days after the billings and
 34 estimates are received from the contractor.

35 ~~G.~~ J. After the effective date of a construction contract, an owner
 36 and contractor may change the number of specified days after certification
 37 and approval for the owner to make payment to the contractor or within which
 38 a billing or estimate must be certified and approved. Any contractor or
 39 subcontractor that does not provide written consent to the change will
 40 continue to be paid as previously agreed.

41 ~~H. When a contractor completes and an owner approves and certifies all~~
 42 ~~work under a construction contract, the owner shall make payment in full on~~
 43 ~~the construction contract within seven days. When a contractor completes and~~
 44 ~~an owner approves and certifies all work under a portion of a construction~~
 45 ~~contract for which the contract states a separate price, the owner shall make~~

~~payment in full on that portion of the construction contract within seven days.~~ On projects that require a federal agency's final approval or certification, the owner shall make FINAL payment ~~in full~~ on the construction contract within ~~seven~~ THIRTY days of the federal agency's final approval or certification.

~~I.~~ K. Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or estimate for the work performed or the material supplied in accordance with the terms of the construction contract between the parties.

~~J.~~ L. A construction contract shall not alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely progress payments as provided under this article.

~~K.~~ M. If an owner or a third party designated by an owner as the person responsible for making progress payments on a construction contract does not make a timely payment pursuant to this section, the owner shall pay the contractor interest at the rate of one and one-half per cent a month or fraction of a month on the unpaid balance, or at a higher rate as the parties to the construction contract agree.

~~L.~~ N. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the issuance of a progress payment to the contractor. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the owner makes the final payment to the contractor on the construction contract.

~~M.~~ O. In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.

~~N.~~ P. If the owner and contractor are a single entity, that entity shall pay its subcontractors or material suppliers within fourteen days after the billing or estimate is certified and approved unless the deadlines for approval and certification or for payment have been modified pursuant to subsection ~~E~~ F or ~~F~~ I.

Q. FOR THE PURPOSES OF THIS SECTION, "FINAL PAYMENT" MEANS ALL AMOUNTS DUE AND PAYABLE TO THE CONTRACTOR UNDER THE TERMS OF THE CONSTRUCTION CONTRACT, INCLUDING ALL RETENTION WITHHELD BY THE OWNER IN ACCORDANCE WITH THE TERMS OF THE CONSTRUCTION CONTRACT.

Sec. 2. Section 32-1129.02, Arizona Revised Statutes, is amended to read:

~~32-1129.02.~~ Performance and payment by contractor, subcontractor or material supplier; conditions; security for performance; interest; definition

A. Notwithstanding the other provisions of this section, performance by a contractor, subcontractor or material supplier in accordance with the provisions of a construction contract entitles the contractor, subcontractor or material supplier to payment from the party with whom the contractor, subcontractor or material supplier contracts.

1 B. If a subcontractor or material supplier has performed in accordance
2 with the provisions of a construction contract, the contractor shall pay to
3 its subcontractors or material suppliers and each subcontractor shall pay to
4 its subcontractors or material suppliers, within seven days of receipt by the
5 contractor or subcontractor of each progress payment ~~or final payment~~, the
6 full amount received for such subcontractor's work and materials supplied
7 based on work completed or materials supplied under the subcontract. Payment
8 shall not be required pursuant to this subsection unless the subcontractor or
9 material supplier provides to the contractor or subcontractor a billing or
10 invoice for the work performed or material supplied in compliance with the
11 terms of the contract between the parties. Each subcontractor or material
12 supplier shall provide a waiver of any mechanic's or materialman's lien
13 conditioned upon payment for the work completed or material supplied. The
14 contractor or subcontractor may require that such conditional waivers of lien
15 be notarized. Any diversion by the contractor or subcontractor of payments
16 received for work performed pursuant to a contract, or failure to reasonably
17 account for the application or use of such payments, constitutes grounds for
18 disciplinary action by the registrar of contractors. Violations of this
19 section shall be grounds for suspension or revocation of a license or other
20 disciplinary action by the registrar pursuant to section 32-1154, subsections
21 B, C and D. The subcontractor or material supplier may notify the registrar
22 of contractors and the owner in writing of any payment less than the amount
23 or percentage approved for the class or item of work as set forth in this
24 section.

25 C. A CONTRACTOR OR SUBCONTRACTOR SHALL MAKE FINAL PAYMENT TO THE
26 SUBCONTRACTOR OR MATERIAL SUPPLIER NOT LATER THAN THIRTY DAYS AFTER THE
27 SUBCONTRACTOR OR THE MATERIAL SUPPLIER HAS PROVIDED THE CONTRACTOR OR
28 SUBCONTRACTOR A BILLING OR INVOICE FOR THE WORK PERFORMED OR MATERIAL
29 SUPPLIED AND HAS PERFORMED IN ACCORDANCE WITH THE PROVISIONS OF THE
30 CONSTRUCTION CONTRACT BETWEEN THE PARTIES.

31 D. A CONTRACTOR OR SUBCONTRACTOR MAY ACCEPT, BUT IS NOT LIMITED TO,
32 ANY OF THE FOLLOWING AS SECURITY FOR PERFORMANCE IN A CONSTRUCTION CONTRACT:

- 33 1. RETENTION.
- 34 2. AN ASSIGNMENT OF TIME CERTIFICATES OF DEPOSIT OF BANKS LICENSED BY
35 THIS STATE, SECURITIES OF OR GUARANTEED BY THE UNITED STATES OR SECURITIES OF
36 THIS STATE IN AN AMOUNT EQUAL TO WHAT THE CONTRACTOR OR SUBCONTRACTOR DEEMS
37 APPROPRIATE IF THE CONSTRUCTION CONTRACT ALLOWS FOR RETENTION.
- 38 3. A PERFORMANCE BOND.
- 39 4. A PAYMENT BOND.
- 40 5. AN INVESTMENT CERTIFICATE OR SHARE ACCOUNT THAT IS ASSIGNED TO BOTH
41 PARTIES AND THAT IS ISSUED BY A FEDERALLY INSURED FINANCIAL INSTITUTION.
- 42 6. A LETTER OF CREDIT.
- 43 7. ANY OTHER FORM OF SECURITY AGREEABLE TO THE PARTIES.

44 ~~C.~~ E. Nothing in this section prevents the contractor or
45 subcontractor, at the time of application or certification to the owner or

1 contractor, from withholding such application or certification to the owner
2 or contractor for payment to the subcontractor or material supplier for
3 unsatisfactory job progress, defective construction work or ~~material~~
4 MATERIALS not remedied, disputed work, failure to comply with other material
5 provisions of the construction contract, third party claims filed or
6 reasonable evidence that a claim will be filed, failure of the subcontractor
7 to make timely payments for labor, equipment and materials, damage to a
8 contractor or another subcontractor or material supplier, ~~OR~~ OR reasonable
9 evidence that the subcontract cannot be completed for the unpaid balance of
10 the subcontract sum or a reasonable amount for retention that does not exceed
11 the actual percentage retained by the owner.

12 ~~D.~~ F. If a periodic or final payment to a subcontractor or material
13 supplier is delayed by more than seven days after receipt of periodic or
14 final payment by the contractor or subcontractor, the contractor or
15 subcontractor shall pay its subcontractor or material supplier interest,
16 except for periods of time during which payment is withheld pursuant to
17 subsection ~~C.~~ E of this section, beginning on the eighth day, at the rate of
18 one and one-half per cent per month or a fraction of a month on the unpaid
19 balance or at such higher rate as the parties agree.

20 ~~E.~~ G. Any licensed contractor, licensed subcontractor or material
21 supplier who files a complaint with the registrar of contractors under this
22 section shall be required to post a surety bond or cash deposit of five
23 hundred dollars or one-half of the amount due, whichever is less, with the
24 registrar to secure the payment of claims under this section. If the
25 complaint is determined by the registrar to be without merit and frivolous,
26 the registrar shall order the person who filed the complaint to pay one-half
27 of the amount of the required surety bond or cash deposit to the respondent
28 and one-half to the registrar for deposit into the state general fund. If no
29 claim may be made under this section against the surety bond or cash deposit,
30 the surety bond or cash deposit shall be returned to the complainant. The
31 surety bond or cash deposit shall be in the name of the licensee or material
32 supplier who files the complaint and shall be subject to claims by the
33 registrar of contractors and the respondent licensee as provided in this
34 section. The surety bond or cash deposit shall be conditioned upon and
35 provide for payment upon the presentation of a certified copy of the order of
36 the registrar and a certification by the complainant of nonpayment within
37 thirty days after the order becomes final. The surety bond shall be executed
38 by the complainant as principal with a corporation duly authorized to
39 transact surety business in this state. Evidence of the surety bond shall be
40 submitted to the registrar in a form acceptable to the registrar. The cash
41 deposit shall be deposited, pursuant to sections 35-146 and 35-147, by the
42 registrar in the contractors prompt pay complaint fund and shall be held for
43 the payment of claims.

1 ~~F.~~ H. In any action or arbitration brought to collect payments or
2 interest pursuant to this section, the successful party shall be awarded
3 costs and attorney fees in a reasonable amount.

4 I. FOR THE PURPOSES OF THIS SECTION, "FINAL PAYMENT" MEANS ALL AMOUNTS
5 DUE AND PAYABLE TO THE SUBCONTRACTOR OR MATERIAL SUPPLIER UNDER THE TERMS OF
6 THE CONSTRUCTION CONTRACT, INCLUDING ALL RETENTION.

7 Sec. 3. Effective date

8 This act is effective from and after December 31, 2008.